(6)

No. 08-1117

In The Supreme Court of the United States

SCOTT DAVID BOWEN,
Petitioner

versus

THE STATE OF OREGON,
Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF OF *AMICUS CURIAE* THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT COURT OREGON IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions — Page(s)

Constitution of the United States

Constitution of the State of Oregon

Statutes — Page(s)

Rules of the Supreme Court — Page(s)

Other Authorities — Page(s)

INTEREST OF AMICUS CURIAE[1]

The Federal Public Defender for the District of Oregon seeks leave to file as an *amicus curiae* on the Petition for Writ of *Certiorari*, whether a criminal conviction based on a non-unanimous jury poll violates the Sixth Amendment as applied to the States through the Fourteenth Amendment.[2]

The Federal Public Defender for the District of Oregon has a twenty-five year history of active representation of petitioners in actions pursuant to 28 U.S.C. § 2254, before the United States District Court for the District of Oregon and the United States Court of Appeals for the Ninth Circuit. A significant portion of these actions involve convictions by non-unanimous jury polls, which is allowed in Oregon for all crimes save capital murder pursuant to the Constitution of the State of Oregon, Article I, Section 11 and Or. Rev.

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[1] Pursuant to Rule 37.3, counsel for *amicus* states that the parties have consented to the filing of this brief; letters of consent from the parties have been submitted to the Clerk of Court. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus curiae* believe that the requirement for unanimity is grounded in the right to proof beyond a reasonable doubt based in either the jury trial protections of the Sixth Amendment or the Due Process protections of the Fifth and Fourteenth Amendments. Regardless of where the right it based, it is a fundamental component of the American system of justice.

Stat. § 136.450.[3]

The Federal Public Defender has several matters pending before both the district courts and the Ninth Circuit Court of Appeals raising the substantive issue of whether a deprivation of liberty based on a non-unanimous jury poll violates the Sixth Amendment to the Constitution of the United States presented in this matter, and additional procedural matters that are not presented here. Cases pending before the Ninth Circuit include: *Pickett v. Hall*, Ninth Circuit Case No. 07-35686 (fully briefed and pending argument); *Reedy v. Blacketter*, Ninth Circuit Case No. 08-35188 (same); *Remme v. Hill*, Ninth Circuit Case No. 09-35439 (in briefing stages). In addition, the Federal Public Defender undertakes continuing legal education exchanges with Oregon's State Public Defender's Office, which is actively pursuing the substantive question in appeals pending before the Oregon state courts and is counsel of record for Petitioner in this matter.

[3/] As with other jurisdictions, the vast majority of criminal convictions in Oregon are pursuant to a guilty plea. Statistics made available by the Oregon Justice Department reflect that for the calendar year of 2007, there were a total of 37,716 felony cases filed in the State of Oregon, of which only 994 – 2.6% – proceeded through a jury trial. *See* www.ojd.state.or.us/osca/documents/2007_Stats_Table_6_001.pdf. *Amicus curiae* are not aware of any statistics that are kept on the number of convictions that are based on a non-unanimous jury poll. Inquiry of criminal trial lawyers in the state, including with the public defender offices in the major metropolitan areas of Portland and Eugene, indicate that between one-third and one-half of all criminal convictions after a jury trial are through non-unanimous polls.

A ruling on the substantive issue will have direct impact on numerous cases pending before the federal and state courts in the district of Oregon.

STATEMENT OF THE CASE

Amicus curiae join the statement of the case presented by counsel for Petitioner. As noted in the petition, Oregon and Louisiana are the only two jurisdictions allowing individuals to be convicted of a crime by a non-unanimous jury poll. *See* Sheri Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U.L. REV. 201, 203 (2006) ("jury verdicts in felony trials must be unanimous in federal courts and in all states except Louisiana and Oregon").

SUMMARY OF ARGUMENT

Depriving an individual of his liberty and freedom based on a non-unanimous jury poll is a violation of fundamental rights including the right to a trial by jury, to proof beyond a reasonable doubt, and to due process, as guaranteed in criminal trials in state courts by the Sixth and Fourteenth Amendments to the Constitution of the United States. *Amicus curiae* join the Petitioner's legal analysis on these issues, and as previously presented in the *amicus curiae* filing in support of the petition for writ of *certiorari* filed in *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1536).

Amicus curiae writes to address why the

deprivation of an individual's liberty based on a non-unanimous jury poll is incompatible with the protections afforded by the Constitution of the United States, and particularly the rights guaranteed by the Fifth, Sixth and Fourteenth Amendments.

Based on this analysis, and that submitted by the Petitioner, *amicus curiae* join in urging this Court to accept *certiorari* and reaffirm our constitutional guarantee that no individual may be deprived of his liberty unless the state has "suffer[ed] the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours'[.]" *Blakely v. Washington*, 542 U.S. 296, 313-314 (2004) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

ARGUMENT

I. The *Apodaca/Johnson* Analysis Regarding Non-Unanimous Juries Is Incompatible With This Court's Recent Jurisprudence.

Forty years ago, in *Duncan v. Louisiana*, 391 U.S. 145, 148-149 (1968), this Court confirmed that the right to a jury trial in criminal cases guaranteed by the Sixth Amendment applied to state criminal proceedings through incorporation via the Due Process Clause of the Fourteenth Amendment.

Just two years later, petitioners from Oregon and Louisiana challenged the constitutionality of their criminal convictions, and attendant deprivations of their liberty, based on jury polls that were not

unanimous. *Apodaca v. Oregon*, 406 U.S. 404 (1972) (*plurality*), *Johnson v. Louisiana*, 406 U.S. 366 (1972) (*plurality*). The cases were presented in two different procedural postures bracketing the decision in *Duncan*; *Johnson* predated, while *Apodaca* post-dated, that ruling. Note, *Non-Unanimous Jury Verdicts*, 86 HARV. L. REV. 148, 148-149 (1972).

Because of the timing, Johnson challenged the non-unanimity based primarily on the Fourteenth Amendment while Apodaca rested his contentions on the Sixth Amendment, arguing that unanimity under the Sixth Amendment was critical for giving meaning to the requirement for proof beyond a reasonable doubt.

As analyzed in Mr. Bowen's petition, the opinions in the cases were deeply fractured, resulted in no majority holding, and turned on the concurring opinion of Justice Powell. Justice Powell, writing for himself alone, concluded that while the Sixth Amendment guaranteed a right to a unanimous jury, this right was not wholly incorporated to the states through the Fourteenth Amendment regardless of the opinion in *Duncan*. *Johnson*, 406 U.S. at 366 (Powell, J., concurring).

As briefed in the petition for writ of *certiorari*, and in the previously presented *amicus curiae* filing in support of *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1536), Justice Powell's analysis is inconsistent with subsequent majority holdings of this Court in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S.

584 (2002), *Blakely v. Washington*, *supra*, and *Cunningham v. California*, _ U.S. _, 127 S. Ct. 856 (2007).

In these majority opinions, this Court examined the rights protected by both the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment. This Court concluded that the protections intended by our Founders included the right to require the state to "suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours'" before depriving a person of their liberty. *Blakely*, 542 U.S. at 313-314 (quoting 4 W. Blackstone, Commentaries at 343).

Notably, in *Ring* this Court analyzed how these holdings could be reconciled with the Court's prior ruling in *Walton v. Arizona*, 497 U.S. 639 (1990), which also addressed the right to a jury trial. This Court ultimately concluded that "our Sixth Amendment jurisprudence cannot be home to both" *Apprendi* and *Walton*, and overturned *Walton*. *Ring*, 536 U.S. at 609-610.

Amicus curiae submit that the analysis which left standing non-unanimous juries in *Apodaca/Johnson* also can not be reconciled with this Court's Fifth and Sixth Amendment jurisprudence as enunciated in *Jones*, *Apprendi*, *Ring*, *Blakely* and *Cunningham*. Like *Walton*, the *Apodaca/Johnson* pluralities should be revisited and overturned.

II. Deprivations Of Liberty Based On Non-Unanimous Jury Polls Are Inconsistent With The Protections Of The Fifth, Sixth And Fourteenth Amendment.

A. A Trial By Jury with Proof Beyond A Reasonable Doubt Protects an Accused from Government Oppression and Unreliable Convictions.

America is unique in its recognition of a constitutionally protected right to a jury for any crime which would result in a deprivation of liberty. Ethan J. Leib, *A Comparison of Criminal Jury Rules in Democratic Countries*, 50 OHIO ST. J. CRIM. L. 629, 630 (Spring 2008) ("the United States offers the jury trial much more broadly to criminal defendants than other countries"); William L. Dwyer, *In the Hands of The People*, at xi (St. Martin's Press 2002) ("To visitors from abroad – even to some Americans – the jury is a surprising invention. . . No other modern society has bet so heavily on the common man's and woman's good sense.")

The right to a criminal trial by jury has been one of the least controversial rights guaranteed by our Constitution: the right was included in the First Continental Congress's Declaration of Rights of 1774; of the twelve states that had adopted written constitutions prior to the Constitutional Convention, the right of a criminal defendant to a jury trial was the only right universally guaranteed; and the need to safeguard the right to a trial by jury was one of the "most consistent points of agreement between the

Federalists and the Anti-Federalists" at the Constitutional Convention. Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870-71 (1994). The right of an accused to a jury trial is recognized as necessary to "prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. at 155; *see also Apprendi*, 530 U.S. at 477-78 (discussing that the jury has historically been, and is perceived by the public as being, the last bastion between the criminally accused and the power of the state) (citing *United States v. Gaudin*, 515 U.S. 506 (1995)).

While the jury stands between the accused and the government, the "beyond a reasonable doubt" standard both ensures that the jury will accurately fulfill its responsibilities when deciding the fate of an accused and encourages respect for, and confidence in, the jury's decision:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

As we said in *Speiser v. Randall, supra*, 357 U.S. [513], at 525-526, 78 S. Ct. [1332], at 1342 [(1958)]: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAMILY LAW QUARTERLY, No. 4, pp. 1, 26 (1967).

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in

> doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship 397 U.S. 358, 363-64 (1970).

The question becomes whether the jury can fulfill its fundamental functions when the opinion of a 2 of its 12 members – 16% – is deemed to be irrelevant.

B. A Lack of Unanimity Fundamentally Alters Jury Deliberation in a Manner that Undermines the Constitutionally Mandated Role of the Jury.

The lack of a unanimity requirement fundamentally impacts the conduct of a jury; empirical evidence documents that failing to require unanimity negatively affects the jury's deliberation process and the accuracy of its fact findings.

Studies of juries that were told they did not have to reach unanimity documented that the juries were less concerned about deliberation and more focused on quickly getting to a verdict; such juries refused to consider the merits of the minority view, they were likely to take the first formal ballot within ten minutes of being seated as a jury, and to continue

to vote often until they reached a verdict by the required number. *Revisiting the Unanimity Requirement,* 100 NW. U. L. REV. at 208. In marked contrast, mock juries that were told they had to reach a unanimous verdict delayed their vote until after they had discussed the evidence and rated their deliberations as both more serious and more thorough. *Id.* Other studies document that when unanimity is not required, the opinions of individual jurors are disenfranchised – and members of a minority or women are the most likely to be disenfranchised. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285-87, 1299-1301 (April 2000).

The lack of deliberation has a direct impact on the quality of the verdict. A lack of deliberation can negatively impact the verdict's accuracy. In one study, individuals called for jury duty were instead asked to sit as mock jurors, and viewed a video of a trial of a case that was intentionally designed by experts not to be sufficient as first degree murder, but instead of a lesser charger. Of the juries that had to deliberate until they reached unanimity, not one jury could reach a unanimous vote of first degree murder; of the juries that were allowed to reach a majority vote, 12% returned a verdict of first degree murder. *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1273. In short, the juries that had to be unanimous more accurately analyzed the evidence, those that did not have to be unanimous were less likely to do so.

The lack of deliberation also impacts the perception of the jury's role. Juries that are

unanimous report great satisfaction and confidence in their verdicts. *Revisiting the Unanimity Requirement,* 100 NW. U. L. REV. at 208. In contrast, the failure to consider the opinions of all jurors "could undermine public confidence in the fairness of the verdicts." *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1314.

C. There Is No Justification for Allowing a Lack of Unanimity in Criminal Juries.

A primary reason for allowing non-unanimous juries is a contention that those who vote "not guilty" are unreasonable, hold-out, jurors simply seeking to cause a hung verdict. *See* Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933, 935 (1998); Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 675 (1997); Note, *Jury Unanimity in California: Should it Stay or Should it Go?*, 29 LOY. L.A. L. REV. 1319, 1347 (1996).

If such a concern was true, however, one would expect a plethora of hung-juries in every jurisdiction that requires unanimity. There is no reason to believe that the individuals called to state jury service in Oregon and Louisiana are more unreasonable than those jurors called to serve in federal courts in the same jurisdiction, or into every other court in the nation both state and federal. As Oregon has about one-third to one-half of all felony trials decided by non-unanimous jury votes, logically one would expect that one-third to one-half of every criminal case in

jurisdictions requiring unanimity to suffer hung juries. In reality, hung juries are rare in all jurisdictions, with analyses finding only 2% of federal trials, and between 4% and 6% of state trials, ending in such verdicts. Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror,* 40 U. MICH. J.L. REFORM 569, 582-83 (Spring 2007); *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1287 n.150.

One study undertaken through the National Center for State Courts via a grant from the Department of Justice, found that less than 4.8% of federal trials between 1980 and 1997, and an average of 6.2% of state trials between 1996 and 1997, ended in hung juries. *Are Hung Juries a Problem?* at 19-25.[4]

While the authors of this research project considered utilizing non-unanimous juries as a solution, the recommendations rejected that option as not addressing the real problems causing hung juries – which was not unreasonable hold-out jurors:

> But it is also clear from this study that such an approach would address the symptoms of disagreement among jurors without necessarily addressing the actual causes -- namely, weak evidence, poor interpersonal dynamics during

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[4] Available at: www.ncsconline.org/WC/Publications/-Res_Juries_HungJuriesProblemPub.pdf.

> deliberations, and jurors' concerns about the appropriateness of legal enforcement in particular cases. Moreover, there is empirical support that the introduction of a non-unanimous verdict rule might also affect the jury's deliberation process in unintended ways such as cutting off minority viewpoints before the jury has an opportunity to consider those opinions thoroughly. Solutions that focus specifically on the underlying causes of juror deadlock, rather than on its effects, may prove to be more effective in the long run. Possible remedies include better case selection and preparation by attorneys; better tools for jurors to understand the evidence and law; and guidance for jurors about how to conduct deliberations.

Id. at 86.

Frequently when a jury is unable to resolve a case, it is because the jury started out significantly divided in their view of the case – not because of a lone, irrational, dissenter. *Standing Alone*, 40 U. MICH. L.J. REFORM at 570-71 (*citing* Denis J. Devine *et al.*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 690-707 (2001).

The Department of Justice's research confirms that allowing convictions by non-unanimous jury polls does not solve some non-existent problem of

unreasonable hold-out jurors, and cannot be justified on that basis.

Another justification cited for allowing non-unanimous juries is that majority vote is quite common in democracy – it is utilized in elections, legislative, and even in appellate judicial proceedings. *See* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1189-90 (1995). Why, then, would it not be reasonable for juries as well? Yet legislatures and judiciaries make prospective laws that bind everyone subject to that law, including the members of the legislature and the judiciary themselves. If the same or subsequent legislature, or different judicial panel, decides that the law was inappropriate or somehow mistaken, they can rectify their action by a new enactment. At no point is a legislature or judicial panel obligated to determine that their enactment is appropriate beyond a reasonable doubt – and few laws could be passed or decisions reached if that was the standard.

In marked contrast, the decision of a criminal jury impacts not them, but the defendant, and it cannot be revisited if the same jurors later doubt their decision. Further, the decision of a criminal jury controls the most fundamental interests guaranteed by our Constitution – life and liberty. The standard of beyond a reasonable doubt is required to protect these fundamental interests, and a majority rule is simply not compatible with that standard. *Winship*, 397 U.S. at 363 (beyond a reasonable doubt standard plays a "vital role" and is the "prime instrument for reducing the risk of convictions resting on factual error"); *see*

also Richard A. Primus, *When Democracy is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417 (January, 1997).

D. As a Mathematical Computation Can Not Be Placed on the Beyond a Reasonable Doubt Standard, the Automatic Rejection of the Opinions of 16% of a Properly Constituted Jury is Constitutionally Unsupportable.

Criminal juries in Oregon, as with all other jurisdictions, are selected from lists of qualified individuals who make up a venire. These individuals are then questioned to discern any bias or other basis to remove them for cause, and only after each side has exercised its peremptory challenges is the petit panel duly sworn to impartially consider the evidence and apply the law. After hearing all the evidence and instructions, the panel retires to deliberate and reach a verdict. In Oregon and Louisiana, however, the opinions of 2 out of 12 – or 16% – of these well qualified jurors may simply be ignored.

This Court has rightly refused to apportion a mathematical number for the "beyond a reasonable doubt" standard of proof. *See, e.g., Holland v. United States*, 348 U.S. 121 (1955). Yet that is what Oregon and Louisiana are *de facto* doing, they are setting "beyond a reasonable doubt" as the conclusion of 84% of the jury. For such a system to pass constitutional muster under the Sixth and Fourteenth Amendments, this Court must determine that the doubts of these

16% of the jury are necessarily, and always, unreasonable. Neither history, logic, nor empirical research, support such a determination.

To the contrary, the empirical research confirms that, far from being unreasonable, hold-out jurors in both non-unanimous civil juries and mock criminal trial juries frequently took the same position as taken by the judges who heard the case. *Revisiting the Unanimity Requirement,* 100 NW. U. L. REV. at 229-230. There is simply no support, either in empirical research or at common law, to believe that the doubts of 16% of a properly constituted petit jury panel are always unreasonable. As Justice Marshall wrote in dissent, joined by Justice Brennan, in *Apodaca/-Johnson*:

> The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt.

406 U.S. at 403.

A common joke in Oregon among the defense bar is that if the classic *Twelve Angry Men* had been filmed here, it would have been a much shorter film. Convictions based on a jury poll which is not unanimous are convictions attained based on a level of proof lower than beyond a reasonable doubt, and are therefore in violation of the guarantees provided by the Sixth and Fourteenth Amendments.

CONCLUSION

For the reasons presented herein, *amicus curiae* join with petitioner in asking this Court to accept *certiorari* and determine whether the practice of depriving an individual of their liberty based on a non-unanimous jury poll is in violation of the protections afforded to an accused by the Sixth and Fourteenth Amendments.

Dated: May 27, 2009

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